UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X Case No. 15-cv-03401 (PAC)

TIFFANY HSUEH,

Plaintiff,

-against-

THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES a/k/a THE DEPARTMENT OF FINANCIAL SERVICES and ABRAHAM GUEVARA, *Individually*,

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT DFS'S MOTION FOR SPOLIATION SANCTIONS AGAINST PLAINTIFF

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Plaintiff Tiffany Hsueh respectfully submits this memorandum, the Declaration of Tiffany Hsueh, and the Declaration of Joshua P. Frank, Esq. in opposition to Defendant DFS's motion for spoliation sanctions.

PRELIMINARY STATEMENT

The Court should be guided by Federal Rule of Civil Procedure 37(e) and relevant caselaw in deciding Defendant DFS's motion. As discussed herein, the relief sought by DFS is inappropriate. Plaintiff Hsueh's husband, Andrew Joe, was able to restore the subject recording; moreover, DFS has had the opportunity to depose both the Plaintiff and Mr. Joe regarding the recording. Therefore, DFS has not been prejudiced with regard to the recording.

FACTUAL BACKGROUND

For the sake of brevity, Plaintiff incorporates herein the factual averments contained in her Civil Action Complaint. (See Declaration of Joshua P. Frank, Esq. ["Declaration"], Exhibit A, Plaintiff's Complaint).

At her deposition, Plaintiff testified regarding the subject recording and the circumstances surrounding its deletion. (See Declaration, Exhibit B, excerpt of Plaintiff's deposition transcript, April 20, 2016). In pertinent part, Plaintiff Hsueh admitted to deleting a recording of a meeting with Allison Clavery. Id. at 205:20 – 208:25.[1] The Plaintiff also explained the purpose of recording the conversation with Ms. Clavery:

[1] Plaintiff's counsel first learned of the deletion at Plaintiff's deposition. Without waiving attorney-client privilege, following the deposition and by telephone, Plaintiff's counsel emphasized the duty to attempt recovery of the recording and the potential for sanctions based on its deletion. Moreover, as with all clients, the Firm's retainer agreement communicates the duty to preserve all evidence, whether physical or electronic, and that failure to do so may result in sanctions. Without waiving attorney-client privilege, Plaintiff's counsel understood that the recording could not be recovered.

Q. Did you record those conversations for purposes of this lawsuit?

A. No.

Q. So then why did you record them?

A. To protect myself.

Q. From what?

A. Retaliation.

Q. Retaliation by who?

A. Allison [Clavery] herself, DFS.

Id. at 206:21 – 207:5.

Plaintiff's husband, Andrew Joe, who works in the information technology field, found a copy of the recording on a back-up hard drive. (See Declaration, Exhibit D, excerpt of Mr. Joe's deposition transcript, September 16, 2016). More specifically, on July 10, 2016, Mr. Joe recovered the recording on a hard drive that he had used to "back up" Plaintiff's computer and his own computer. Id. at 107:16-25. Mr. Joe first looked through Plaintiff's computer to find the recording but found nothing. The following day, he searched Plaintiff's computer again, using a "different method" but did not find the recording. Id. at 108:11 – 109:1. Mr. Joe then remembered his back-up hard drive on which he located a copy of the subject recording. Id. at 109:1-25; 142:19-25.

Although DFS concludes that the recording is incomplete (*i.e.*, that there is an "unrecovered portion"), there is insufficient support for such a finding.[2] While the recording cuts off mid-sentence, that fact does not establish that the Plaintiff recorded more of the meeting;

[2] Jury members who listen to the recording will also hear, and weigh, testimony from the Plaintiff and Ms. Clavery regarding what transpired during the portion of the meeting that was not recorded. Moreover, the defense will likely cross-examine the Plaintiff regarding the recording and the underlying meeting, permitting the jury to reach their own conclusions.

indeed, the Plaintiff testified that she recorded only what is contained in the recovered copy of the recording.

Q. Was the entire recording recovered?

A. Yes.

Q. How can you be sure?

A. It's the only recording I have.

Q. I'm asking if the entire recording was recovered?

A. That's the entire recording.

Q. How do you know?

A. I only made one recording.

Q. I understand you only made one. I'm asking if it's possible only part was recovered.

A. No.

[. . . .]

Q. How do you know your husband recovered the whole thing?

A. That's as far as the space on my recorder had.

[. . . .]

(See Declaration, Exhibit C, excerpt of Plaintiff's deposition transcript, September 9, 2016, 199:6-23, 201:7-25, 202:1-9, which contains the above testimony and additional related testimony). Furthermore, please refer to the accompanying Declaration of Plaintiff Tiffany Hsueh with regard to the completeness of the recovered recording.

ARGUMENT

A. The Applicable Standard

Federal Rule of Civil Procedure 37(e), as amended in 2015, sets forth the standard applicable to DFS's motion. Rule 37(e) applies to "Failure to Preserve Electronically Stored Information." Plaintiff recorded the conversation using a Sony MP3 Player. (Exhibit C, 260:6-15, 261:3-23). An MP3 Player is an electronic device that plays digital audio files. Id. There is no doubt that the MP3 digital audio recording constitutes electronically stored information.

According to Rule 37(e),

> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

B. The Recording was Restored

Rule 37(e) "applies only when such [electronically stored] information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere." (Committee Notes on Rules—2015 Amendment to Rule 37(e)). Moreover, "Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. **If the information is restored or replaced, no further measures should be taken.**" Id. (Emphasis added).

DFS has not been prejudiced by the recording's deletion and, therefore, spoliation sanctions are not warranted.

C. The Requested Relief

It is undisputed that the recording should not have been deleted. However, Plaintiff Hsueh testified that she deleted the recording because she "could barely hear it, and I was also nervous if it was legal to record without permission."[3] (Exhibit C, 212:15-19, 263:5-11). There is an insufficient basis upon which to conclude that Plaintiff deleted the recording with intent to prevent its use in litigation. At her deposition, she admitted to making the recording; she did not deny its existence.

In any event, the recording has been restored. However, even in cases where evidence cannot be recovered, severe sanctions are disfavored. For example, in Cat3, LLC v. Black Lineage, Inc., 2016 U.S. Dist. LEXIS 3618, *31 (S.D.N.Y. Jan. 12, 2016), the Court found that the plaintiffs had not only deleted emails but also had engaged in misconduct by favorably doctoring other emails that had been produced in discovery. Nonetheless, the Court stated, "[a]n order of dismissal, an adverse inference, or a broader preclusion order would unnecessarily hamper the plaintiffs in advancing what might, in fact, be legitimate claims." As Rule 37(e) makes clear, "[a] court may not impose a sanction at all without a finding of 'prejudice to another party[,]' and even then, the sanction may be 'no greater than necessary to cure the prejudice. . . .' Fed. R. Civ. P. 37(e)(1)." SEC v. CKB168 Holdings, Inc., 2016 U.S. Dist.

[3] Speakers were used to play the recording at Plaintiff's deposition. However, Plaintiff testified that, "my own recording from my equipment, I couldn't hear much." (Exhibit C, 213:2-14).

LEXIS 16533, *13 (E.D.N.Y. Feb. 2, 2016). Again, DFS has not been prejudiced by the deleted recording as it has been restored and, moreover, DFS has had an opportunity to depose the Plaintiff and her husband about the recording.

Furthermore, costs and attorneys' fees should not be assessed for re-opened discovery as the vast majority of the discovery focused on Plaintiff's past mental health. For example, the Plaintiff's re-opened deposition contains 31 pages of testimony regarding the recording, out of 270 total pages of testimony (roughly 11%). Moreover, the case referenced in paragraph 37 of the Supplemental Declaration of Eva L. Deitz (Kosher Sports, Inc. v. Queens Ballpark Co., LLC, 2011 U.S. Dist. LEXIS 86651 [Aug. 5, 2011]) is inapposite as it addresses serious misconduct regarding both intentionally concealed evidence and destroyed evidence that is clearly distinguishable from the spoliation issue in the present matter. Nonetheless, the Court declined to order severe sanctions in Kosher Sports, Inc. for the destroyed recordings (which had not been restored) and only awarded expenses and attorneys' fees to address the intentional concealment of withheld recordings. Id. at *40-46, 57.

CONCLUSION

In light of the argument presented herein, Plaintiff Tiffany Hsueh respectfully requests that this Court deny Defendant DFS's motion for spoliation sanctions.

Dated: New York, New York
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